

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES (IATSE), LOCAL 16
(VARIOUS EMPLOYERS)

and

20–CB–218555

DAMOND MCFARLAND, AN INDIVIDUAL

Tracy Clark, Esq., for the General Counsel

Caren P. Sencer, Esq. (Weinberg, Roger & Rosenfeld)
For the Respondent¹

DECISION

Statement of the Case

ARIEL L. SOTOLONGO, Administrative Law Judge. At issue in this case is whether IATSE Local 16 (Respondent or Union) unlawfully suspended or barred Damond McFarland, an individual, from using its exclusive hiring hall to obtain job referrals.

I. Procedural Background

Based on an original charge filed on April 16, 2018, and an amended charge filed on June 29, 2018 by McFarland, the Regional Director for Region 20 of the Board issued a complaint on June 29, 2018, alleging that Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the Act by barring McFarland from using its exclusive referral system to obtain job referrals to or with employers with whom Respondent has collective-bargaining agreements.² Respondent filed a timely answer, in which it denied that it had violated the Act as alleged in the complaint.

¹ Also appearing with Ms. Sencer on brief was Kristina L. Hillman, Esq., of the same firm.

² The complaint alleges that this suspension was permanent, but as discussed below the record shows that the suspension was lifted or rescinded on or about June 21, 2018.

II. Jurisdiction and Labor Organization Status

The complaint alleges that two employers which are signatory to collective-bargaining agreements with Respondent, and to whom Respondent refers individuals through its hiring hall pursuant to the terms of said agreements, namely Production Support Services, Inc. (PSS), and Audio Visual Services Group, Inc. d/b/a PSAV (PSAV), are engaged in interstate commerce and are employers within the meaning of Section 2(2), (6), and (7) of the Act. In its answer, Respondent denied these allegations of the complaint. At the hearing, the General Counsel introduced a sworn and notarized affidavit by Gregory L. Decker, president of PSS, which I admitted under FRE Sec. 902(11), in which he describes PSS operations and sales, which he is familiar with (GC Exh. 2). According to Decker, PSS is a Nevada corporation with offices in Las Vegas, and is engaged in providing labor coordination and payroll services for businesses engaged in the production of special events and tradeshow.³ Decker additionally states in his affidavit that according to PSS' business records, which he is also familiar with, during the 12-month period ending on May 31, 2018, PSS provided (labor) services valued in excess of \$1.2 million dollars to clients located in California.⁴ The General Counsel additionally introduced a sworn and notarized affidavit by Charlie Young, the Chief Human Resources officer for PSAV, which is signatory to a collective-bargaining agreement with Respondent, and an employer to whom Respondent refers individuals to through its referral hall. According to Young's affidavit, also admitted pursuant to FRE Sec. 902(11), PSAV is a Delaware corporation with offices in Schiller Park, Illinois. During the 12-month period ending on March 15, 2018, according to Young, PSAV provided services valued in excess of \$50,000 to customers located in the State of Texas. Based on this evidence, I conclude that both PSS and PSAV are engaged in interstate commerce in the requisite threshold amounts, and that both are employers within the meaning Section 2(2), (6), and (7) of the Act.

Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. Findings of Fact

At the outset, I note that the relevant and significant facts in this case are not truly in dispute. Thus, Respondent's June 21, 2018 letter to McFarland (GC Exh. 5) confirms—and admits—that Respondent suspended McFarland's referral hall privileges on or about March 28,

³ Steve Lutge, who is Respondent's Business Agent and Recording Secretary, and admitted agent of Respondent, testified that Respondent refers workers (also referred to as "technicians") to PSS pursuant to their collective-bargaining agreement (GC Exh. 9; Tr. 174).

⁴ Respondent's counsel objected to the admission of Decker's affidavit because she claimed—without providing evidence in support—that Respondent was aware of projects that PSS had worked on in California that were not listed in the affidavit. Even if true, however, this does not in my view undermine the accuracy or reliability of the affidavit. Rather, it would instead indicate that the total volume of PSS' revenue for out-of-state services or sales was actually higher than reflected in the affidavit, a prospect that would only cement the conclusion that PSS was engaged in interstate commerce, since the \$1.2 million reflected in the affidavit already exceeded the \$50,000 non-retail threshold required for jurisdiction in these circumstances. In this regard, I note that in its post hearing brief Respondent did not further raise the issue of jurisdiction, apparently conceding what is readily apparent.

2018, as alleged in the complaint.⁵ Indeed, this letter also confirms McFarland’s undisputed and un rebutted testimony that on March 28 Respondent’s President, Jim Beaumont, informed him during a phone conversation that his services were “no longer needed.” (Tr. 37–38). The only factual dispute appears to be whether Respondent operated an “exclusive” referral hall, which is also a legal question, and what misconduct on McFarland’s part, if any, triggered his suspension.⁶

Regarding the operation of the referral hall, the record shows that the typical or prototype “Master” collective-bargaining agreement between Respondent and signatory employers contains a provision stating, inter alia, that employers “shall hire workers supplied by Local 16, regardless of venue, to perform all work that is by custom and practice performed by technicians under the jurisdiction of local 16...” (GC Exh. 6, p. 4;). Identical language is contained in the typical or prototype “Project” collective-bargaining agreement signed by employers (GC Exh. 7, p. 4), and contained as well in the collective-bargaining agreements signed by PSAV (GC Exh. 8) and PSS (GC Exh. 9).⁷ Respondent’s Business Agent and Recording Secretary, Steve Lutge, testified that about 200 employers are signatory to the Master agreement, including PSS and PSAV. Lutge testified that Respondent refers “technicians,” as workers are called in the agreements, to both PSS and PSAV, on a daily basis in the case of PSAV. According to Lutge, there are essentially three ways a signatory employer can obtain a technician to work in one of its projects (in Respondent’s jurisdiction, which runs from San Mateo County in the San Francisco peninsula all the way to the Oregon border, along the coast): “Must be” hires, also known as “direct” hires, in which an employer directly contacts a technician, and assuming the technician is able and willing to take the job, the employer then informs Respondent, which typically approves such hire. The technician must be registered with Respondent, however, and must also possess the right set of skills for the job at hand, universal requirements in all instances. The second way a technician can be hired is a so-called “name request,” in which an employer contacts Respondent and requests a specific individual by name. Granting this request is at Respondent’s discretion, however, and the requested individual must be at the top of the referral list—so that no otherwise qualified technician can be by-passed on the list.⁸ The final method is the “regular” referral, also called a “simple request,” where an employer requests a technician for a given job and Respondent refers the first individual on the list, provided he/she has the right set of skills for the job. Lutge admitted that he knows of no instance where a signatory employer has hired any

⁵ All dates hereafter shall be in calendar year 2018, unless otherwise specified. The letter also informs McFarland that the suspension was lifted, effective immediately.

⁶ Whether the alleged misconduct, even if true, would lawfully permit Respondent to suspend McFarland, is a separate and legal issue, as discussed below.

⁷ The primary difference between the Master and Project Agreements is that Project Agreements are limited to one event, up to 6 months in duration, and have a slightly higher wage and benefit package (Tr. 164).

⁸ Thus, it is not clear how this second method would be different from the third method described below, which is simply requesting the Union to refer a technician from its referral list.

technician not registered with Respondent.⁹ Finally, Luge testified that a technician can signal his/her availability by registering on-line at the union website or registering by phone. He admitted Respondent can block someone from registering on line, as occurred in the case of McFarland staring on March 28. (Tr. 161–164; 166–169; 171–172; 175–191).

As discussed above, there is no dispute that the Union “suspended” McFarland, barring him from using the referral hall from March 28 to June 21, as admitted by Lutge (Tr. 192) and confirmed by Respondent’s June 21 letter (GC Exh. 5). Respondent’s defense, in addition to asserting that it was not operating an exclusive hiring (or referral) hall, is that McFarland engaged in behavior that violated its code of conduct, which those using the referral hall must abide by.¹⁰

I do not believe that a detailed discussion of the events that culminated in the January 28 suspension of McFarland is necessary, nor for that matter will a detailed credibility resolution be necessary—since many of the material facts are again not truly in dispute, and those that are will not be legally relevant. A summary of these events, however, will help provide context for what occurred. McFarland testified that he has been a member of the Union since 2014, and works events as a carpenter and stagehand, and occasionally on audio-visual props. All of the jobs he has worked on since that time, except for two jobs, he has been referred by Respondent.¹¹ Typically, McFarland registers his availability for referrals by signing up on Respondent’s (referral) website, for which he has a username and password. He started using the Union’s website for this purpose in 2015; previously he had registered by phone.

For a little over a year prior to March 28, since about December 2016, McFarland had been complaining—or attempting to complain—to Respondent about some problems he had experienced. Sometime around December 2016, McFarland claims too have been a victim of a sexual assault by a fellow member of the Union, which apparently occurred during a holiday party. He reported the incident to the Union by email, and personally met with three union representatives shortly thereafter, whom McFarland asserts took notes about the incident he

⁹ About a dozen signatory employers, including PSAV, entered into “side-letter” agreements with Respondent, allowing the employer to staff events with their “regular” (or permanent) employees (See, e.g., GC Exh. 8/p 25, allowing PSAV employees in its San Francisco branch to staff events in that city). Although Lutge testified that these “side agreements” allowed employers to “bypass” the Union’s referral process (Tr. 215), I do not believe that this is an accurate statement. Bypassing the referral process, in my view, would mean hiring an un-registered worker or technician “off the street” on a temporary basis for a given project, for instance, rather than using a regular or permanent employee who already is on the employer’s payroll to staff an event, as allowed in the side-letter agreements. I would note that the side-letter between PSAV and Respondent, PSAV was limited to using only two such regular employees per event, which implies that any additional technicians needed, would have to be hired through the Union’s referral process. The same holds true, in my view, for the “Addendum” in the contract between Respondent and PSAV (GC Exh. 8/p 24), which allows the latter to use its “regularly employed” or “full time” employees at its hotel locations, but no more than three such employees for any single function at each hotel. Again, this does not appear to “bypass” the hiring hall, since the employer is simply allowed to use its regular employees.

¹⁰ There is no evidence, or assertion by Respondent, that McFarland was delinquent in his dues, as admitted by Lutge (Tr. 196–197).

¹¹ One of the jobs was in Santa Clara, which is outside of Respondent’s jurisdiction, and the other on a project in Moscone Center in San Francisco. He was referred to that job by the International Union of Painters and Allied Trades (IUPAT) Local 510, which apparently had jurisdiction over that particular project (Tr. 29).

reported.¹² Apparently, McFarland never heard back from the Union on this issue, so a year later, on January 2, 2018, he visited the union hall to inquire about this matter as well as his apprenticeship status, for which he had applied in late 2017.¹³ McFarland came to the union hall on that date accompanied by his mother, and what transpired next is, to put it plainly, bizarre.

5 According to McFarland’s testimony, he asked the receptionist (Joanne) about the status of his sexual assault complaint, specifically asking to get whatever documentation (or “paper trail,” as McFarland referred to it) the Union had on this complaint. The receptionist initially could not find what McFarland was requesting (in the computer), so she referred him to Jim Beaumont, the Union President.¹⁴ Beaumont asked McFarland to come into his office, which was in the
10 “inside” (or private) part of the Union’s hall, past the reception area. When McFarland went inside to Beaumont’s office, his mother, who was in the reception area, started to scream, apparently concerned about his safety. As the result of this commotion, Beaumont asked McFarland’s mother to leave the hall, which McFarland felt was disrespectful to her. After leaving the hall with his mother, McFarland dialed 9-1-1, the emergency operator, to report that
15 the Union had failed to provide him with the documentation he requested. According to McFarland, the emergency operator told him they would dispatch a police unit, and he waited for 3 hours near the hall—but the police never showed up.¹⁵ (Tr. 75–79; 81–82; 84–85; 89–102; 104–105).

20 According to McFarland, for the next 3 months or so, until March 28, he did not visit the union hall, but he frequently phoned or emailed Respondent to inquire about his sexual harassment complaint, to inquire about the status of his apprenticeship, and to inquire why he was not being referred to jobs.¹⁶ On March 28, McFarland testified called the Union several times, first asking to speak with agent Robert Borelis and after failing to reach Borelis called on
25 at least two separate occasions and asked to speak to Beaumont. He was connected to another (male) agent, whose name McFarland could not recall, who told him Beaumont was unavailable. Although McFarland admitted to being “agitated” and raising his voice during the phone call with this agent, he denied using any profanity and testified he did not say anything “too egregious.” McFarland did not further elaborate on what else, if anything, was said in this
30 conversation. McFarland testified that Beaumont finally called a short time later and said that he was not going to be allowed to meet with Borelis. Beaumont then said that he was tired of McFarland harassing and cursing out him and his staff, and of being disrespectful, adding that

¹² According to McFarland the first names of the three agents he met with on that occasion were Joanne, Danny and David, last names uncertain.

¹³ It is not clear what McFarland expected Respondent to do regarding the allegation of sexual harassment by another union member, since it would appear that this type of complaint should instead be directed at the employer, assuming they were both working for the same employer, or directed at a government agency. Indeed, Lutge testified that he spoke on the phone with McFarland in January 2018, and told him that he had to bring up these types of claims with the employers, and also notify the Union at the time these incidents occurred, not weeks or months later (Tr. 219–220). Nonetheless, as discussed below, McFarland was clearly frustrated with what he perceived to be, validly or not, the Union’s lack of response or action regarding his complaints or grievances.

¹⁴ At some point, Joanne found the email McFarland had initially sent the Union about this, and printed it for him.

¹⁵ No surprise here.

¹⁶ According to McFarland, he was either phoning the Union about 3 to 5 times per week during this period, asking to speak to several different agents and sent emails as well. It is not clear whether he spoke to any of these agents, although he testified that he did not get any response to his inquiries. McFarland had one job referral during this period, on the week of March 15.

this was his second “infraction.” According to McFarland, Beaumont then told him that his services “were no longer needed,” which he understood to mean that he was being “fired.” After this conversation with Beaumont, McFarland tried to log-in to the union referral website numerous times, without success, something that continued through June 21.

Patrick Murphy, an assistant business agent with Respondent, testified that he was the agent who spoke to McFarland on the phone on March 28, when McFarland was trying to reach Beaumont. According to Murphy, he noticed that the receptionist appeared to be distressed over a call that she was handling, and told the receptionist to transfer the call to him. When his phone rang, Murphy answered “This is Pat...” The caller asked if this was Jim, and Murphy said “no, it’s Pat Murphy, Jim is not available. Can I help?” The caller, who he recognized as McFarland, then said “I need to talk to fucking Jim Beaumont.” Murphy then repeated that Beaumont was not available, and asked if he could help. McFarland replied “no, bitch, I need Jim Beaumont.” Murphy replied “now I am a bitch?,” to which McFarland responded “yeah, you fucking bitch, I need to talk to Beaumont.” Murphy then said that Beaumont was not available, at which point McFarland hung up. He described McFarland as agitated and verbally aggressive during their conversation, and added that in his experience as a union representative, no one had ever spoken to him in the manner McFarland did. After his conversation with McFarland, Murphy went to see Beaumont in his office to report what had occurred. (Tr. 229–232; 237).

Beaumont did not testify. Besides Murphy, whose testimony was discussed above, the only other union representative who testified was Lutge, who confirmed that Respondent suspended McFarland referral hall privileges from March 28 to June 21, as indicated by the Union’s June 21 letter (GC Exh. 5; Tr. 192).

In its post hearing brief Respondent argues, *inter alia*, that McFarland is not a credible witness. I find there is no need to make a credibility resolution, because McFarland’s conduct is not disputed—most of testimony regarding the conduct came from McFarland himself, and McFarland never rebutted Murphy’s testimony, the only other witness to testify as to how he behaved.¹⁷

Finally, it should be noted that included in the record are the Union’s “Referral Procedures and Code of Conduct.” (GC Exh. 10). Conduct Code No. 8 (GC Exh 10/4), prohibits

¹⁷ Nonetheless, I would make the following observations. First, it is clear from the record that McFarland was frustrated, even angry, with the Union. Throughout the record, he made repeated references about the Union (or its representatives) “discriminating” against him (Tr. 45), or ignoring or sweeping things “under the rug” (Tr. 68), or sending him “in circles” (Tr. 78) or engaging “in a collective effort...to keep information from me” (Tr. 81), which plainly suggests that he believed the Union was conspiring to ignore or disregard his complaints or grievances. In light of such apparent frustration or anger, it is not difficult to conclude that on the day in question, March 28, McFarland acted in a manner consistent with his feelings and was rude and abusive to union staffers. McFarland was at times, primarily during cross-examination, an argumentative witness whose testimony was often contradictory and difficult to follow. Indeed, it is notable that at one point during his testimony, when I asked him to clarify something—in a completely normal tone of voice and non-confrontational manner—McFarland interrupted me and snapped: “That’s what I’m trying to tell you, brother, if you listen...” (Tr. 45/15). Given this impertinent if not insolent way of addressing a judge, it is not difficult to conclude that McFarland engaged in worse behavior when addressing union staffers. At issue here, however, is not whether he engaged in rude and abusive conduct, but whether such conduct lawfully permitted the Union to suspend his referral hall privileges, as discussed below.

“Abusive, threatening, obscene, insulting or harassing activity on the job or to any Local 16 office personnel.” The Code of Conduct Guidelines also state, *inter alia*, that breach of the guidelines can result in “corrective action” as deemed necessary, depending on the severity of the offense, “ranging from a warning, probation letter, suspension of work privileges, a combination of the same or permanent removal of work privileges.” (GC Exh. 10/3).

IV. Discussion and Analysis

When operating an exclusive hiring (or referral) hall, unions have a duty of fair representation to all individuals using the hall, and as part of this duty the union must operate the hall in a fair and impartial manner. This means that application of any referral rules cannot be discriminatory or arbitrary. *IATSE Local 838 (Freeman Decorating Co.)*, 364 NLRB No. 81, slip op at 2–3 (2016). In that regard, it is well-established that when a union interferes with a referent’s employment status (by failing or refusing to refer such individual) for reasons *other* than the individual’s failure to pay dues, initiation fees, or other fees uniformly required, there is a presumption that it is encouraging union membership in violation of Section 8(b)(1)(a) and 8(b)(2) of the Act, a presumption that the union can overcome by showing that its actions were necessary for the effective performance of its representational function. *Plumbers Local 342 (Contra Costa Electric)*, 329 NLRB 688, 691 (1999); *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973), *enf. denied* on other grounds 555 F.2d 552 (6th Cir. 1977). In overcoming such presumption, as the Board explained in *Ohio Contractors*, the union must show that its sanction—its refusal to refer—is the result of simply more than a convenient enforcement of its internal rules of conduct. Rather, the union must show that the use of this sanction is essential to its effective representation of employees. *Id. at 681*. In *Ohio Contractors*, the sanctioned individual had engaged in offensive conduct at the hiring hall and had additionally engaged in conduct disruptive of an internal union election.¹⁸ The Board in that case found that the violation of the union’s internal rules of conduct was insufficient to warrant the sanction imposed, which as here, was to interfere with an individual’s employment status. Similarly, in *Longshoremen’s Local 1408 (Jacksonville Maritime Association)*, 258 NLRB 132 (1981), the Board found a violation of when the union refused to refer a member (Lindsay) who had cursed at, and even threatened, the union’s president, concluding that the union had other effective means of addressing Lindsay’s misconduct short of affecting his employment status.¹⁹ See, also, *Millwrights Local 1931 (United Brotherhood of Carpenters)*, 281 NLRB 1068, 1070 (1986) (the union unlawfully excluded an individual, McCaffery, from its out-of-work list because he had cursed and shouted at the union’s business manager).

On the other hand, the Board has upheld unions’ refusal to make referrals when they meet the burden of showing that the individuals’ conduct interfered with the integrity of the referral system or negatively impacted the unions’ relationship with employers that use such referral system. See, e.g., *Boilermakers Local 40 (Envirotech Corp.)*, 266 NLRB 432, 433–434 (1983) (union suspended an individual for violating referral rules by applying for work directly with

¹⁸ The conduct of the individual in question, Murphy, included yelling obscenities at the staffers working in the hiring hall during his visit(s). This would appear similar in nature to the conduct engaged in by McFarland, except his conduct was over the phone.

¹⁹ I would note that Lindsay’s behavior appears to have been far more egregious than McFarland’s in the instant case.

employers); *United Brotherhood of Painters, Decorators & Paperhangers of America, Local Union No. 487 (American Coatings, Inc.)*, 226 NLRB 299, 301 (1976) (again, bypassing referral hall rules by seeking direct employment); *Longshoremen Local 341 (West Gulf Maritime Assn.)*, 254 NLRB 334 (1981) (union refused to refer an individual who caused a wildcat strike); *Stage Employees IATSE Local 150 (Mann Theaters)*, 268 NLRB 1292 (1984) (union refused to refer individual with a long history of misconduct such that many of the employers requested the employee not to be referred).²⁰

Thus, the demarcation line between union conduct that is permissible and that which is not appears to be the extent to which the unions meet their burden of establishing that the conduct of the individual(s) in question impacted the integrity of the referral system or impacted the unions' relationship with employers. As illustrated by the cases cited above, individuals who "cheated" the system by arranging for direct hires from employers, therefore bypassing the referral system and breaking its rules, clearly undermined the integrity of the system. The same holds true for individuals who repeatedly engaged in egregious conduct that either undermined the referral system or the unions' relationship with employers who used that system. On the other hand, isolated instances of offensive conduct directed at union officials or staff, particularly if such conduct did not directly impact the governance or operation of the referral system itself, appears not to justify the ultimate penalty of job sanctions. In that respect, the Board has stressed that unions bear the burden of demonstrating how the penalty imposed protects the integrity of the referral system; a simple bald assertion that an individual violated the union's internal rules—*any rules*—does not suffice to meet this burden. See, e.g., *Plasterers' Local 232 (John J. Ruhlin Construction)*, 268 NLRB 795, 798 (1984); *Operating Engineers Local 478 (Stone & Webster)*, 271 NLRB 1382, 1385 (1984).

In the instant case, the evidence shows McFarland acted in an offensive and rude manner toward Respondent's assistant business agent Murphy, during their phone conversation, calling him a "bitch" and stating that he wanted to talk with "fucking" Jim Beaumont—not with Murphy.²¹ Such evidence arguably supports a finding that McFarland violated Respondent's "Code of Conduct," which prohibits, inter alia, "abusive, threatening, obscene, insulting or harassing activity...to (sic) any Local 16 office personnel." What Respondent has failed to do here, however, is to show how violating this particular rule, in the manner McFarland did, could reasonably or rationally be seen as conduct which would undermine the integrity of the referral system or would jeopardize Respondent relationship with employers. In that regard I note that there is no evidence that McFarland's conduct was witnessed by other referral hall users or

²⁰ See also, *IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1 (2000) (employee with a 15-year history of misconduct toward fellow employees, employers and their clients). The 9th Circuit refused to enforce this decision in *Lucas v. NLRB*, 333 F.3d 927 (9th Cir. 2003), finding that unions in hiring hall context owed a "heightened duty" standard. The Board, however, has not adopted such standard. See, e.g., *IBEW Local 48 (Oregon-Columbia Chapter of NECA)*, 342 NLRB 101, 101–108 (2004); *Teamsters Local 631 (Vosburg Equipment, Inc.)*, 340 NLRB 881, fn. 4 (2003).

²¹ Murphy also implied that McFarland had engaged in a similarly rude or offensive conduct toward the receptionist(s) who first answered his phone call(s). There was no testimony from such individual(s), so no finding can be made in that respect.

applicants, or by any employer representatives, or that it had been a repeated or recurrent offense.²² Nor is there any evidence that Respondent had previously warned McFarland that such conduct would result in sanctions if repeated. Certainly, the cases cited above do not suggest that the type of conduct McFarland engaged in would support or justify immediate employment sanctions, without any sort of warning or before initially employing a less severe form of disciplinary or remedial action. Indeed, as discussed above, the conduct engaged in by McFarland appears far less extensive, serious or egregious than the conduct in *Jacksonville Maritime* or *Ohio Contractors*, supra., found by the Board not to justify employment sanctions.

In light of the above, given that McFarland’s infraction had nothing to do with his failure to pay dues, initiation fees, or other fees uniformly required, I conclude that Respondent has not met its burden of overcoming the presumption that his employment-related sanction was unlawful. Accordingly, I conclude that by suspending McFarland’s referral hall privileges from March 28 to June 21, Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the Act.

In so concluding, I specifically reject Respondent’s argument, unsupported by any case authority, that its referral hall was not “exclusive.” In that regard, the language in the collective-bargaining agreements in evidence, which provide that employers “shall hire workers supplied by Local 16,” (emphasis provided) plainly shows that all technicians referred to employers by Respondent had to be registered at the hall. *United Brotherhood of Carpenters, Local No. 78 (Murray Walter, Inc.)*, 223 NLRB 733, 735 (1976); *Bricklayers’ and Stonemasons’ International Union, Local 8 (California Conference of Mason Contractor Associations, Inc.)*, 235 NLRB 1001 (1978). In that regard, the Board has long held that an exclusive hiring hall exists where a union is the first and primary source of employees for the employer, whether by written or verbal agreement, or past practice. See, e.g., *Plumbers Local 198 (Stone & Webster)*, 319 NLRB 609, 612 (1995); *Teamsters Local 293 (Beverage Distributors)*, 302 NLRB 403, 404 (1991). Likewise, an exclusive hiring hall exists when employees hired must be cleared—or registered with—the union, as in the case of “must be” or “direct” hires under the agreements here. See, e.g., *Plumbers Local Union No. 17 (FSM Mechanical Contractor Inc.)*, 224 NLRB 1262, 1263 (1976); *Operating Engineers, Local 513 (McFry Excavating and Demolition Co.)*, 197 NLRB 1046, 1049 (1972). Finally, I find, contrary to Respondent’s arguments, that employers’ ability to use their own regular or “in-house” employees prior to obtaining referrals at certain projects, as permitted by the addendums or side-letters in agreements described above, does not negate the exclusive nature of Respondent’s referral hall. See e.g., *Laborers Local 663 (Treuner Construction)*, 205 NLRB 455, 456 (1973); *United Brotherhood of Carpenters, Local No. 78*, supra.

²² The record indicates that McFarland regularly and repeatedly either phoned or emailed Respondent seeking information on his various complaints or grievances, or to find out about his apprenticeship status. There is nothing inherently wrong with this, however, nor is there any persuasive evidence that this somehow violated the rules, exasperating as this may have been. Likewise, there is no evidence that the January 2 incident, when Respondent asked McFarland’s mother to leave the hall, was a basis for Respondent’s subsequent March 28 sanction. After all, bizarre as such incident was, it was McFarland’s mother, not him, who engaged in arguably disruptive conduct. I also note that McFarland testified that during their March 28 phone conversation, Beaumont told McFarland that this was his “second infraction,” but did not elaborate. Beaumont did not testify, so it’s unknown what “infraction(s)” he was referring to. Simply put, Respondent failed to establish any pattern of conduct by McFarland that would justify or support the severe sanction imposed.

In sum, and for the reasons outlined above, I find Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the Act.

CONCLUSIONS OF LAW

1. International Alliance of Theatrical Stage Employees (IATSE), Local 16 (Respondent), is a labor organization within the meaning of Section 2(5) of the Act.
2. Production Support Services, Inc. (PSS) and Audio Visual Services Group, Inc. (PSAV) are employers as defined in Section 2(2), (6), and (7) of the Act.
3. By refusing, for reasons other than the nonpayment of dues, initiation fees, and other fees uniformly required, to allow Damond McFarland to register for work at Respondent's referral hall from March 28, 2018 to June 21, 2018, Respondent engaged in a discriminatory hiring hall practice in violation of Section 8(b)(1)(A) and 8(b)(2) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

The appropriate remedy for the Section 8(b)(1)(A) and 8(b)(2) violations that I have found is an Order requiring Respondent to cease and desist from such conduct and take certain affirmative actions consistent with the policies and purposes of the Act.

Specifically, to the extent that Respondent has not already done so, Respondent shall cease and desist from suspending or barring Damond McFarland from registering at or using its exclusive hiring hall referral service for unfair and/or arbitrary reasons, and shall cease and desist from refusing to refer McFarland based on unfair and/or arbitrary reasons, therefore causing employers not to hire him.

Respondent shall also cease and desist, in any other manner, from interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

Having found that Respondent unlawfully refused to allow McFarland to register at or use its exclusive hiring hall from March 28, 2018 to June 21, 2018, Respondent must make McFarland whole for loss of earnings and/or benefits he may have suffered as the result of its above-described conduct. The Respondent shall make McFarland whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate him for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate McFarland for the adverse tax consequences, if any, of receiving lump sum awards,

and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 20 a report allocating the make-whole amount to the appropriate calendar year for McFarland. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

Respondent shall also be required to remove from its files any references to the unlawful suspension of McFarland from exclusive hiring hall referral service and notify him in writing that this has been done and that his suspension will not be used against him in any way.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted at Respondent's business office or wherever the notices to members or registrants of the hall are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members and registrants by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current members and registrants and former members or registrants who have used the hall since March 28, 2018. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 20 of the Board what action it will take with respect to this decision.

Accordingly, based on the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended²³

ORDER

International Alliance of Theatrical Stage Employees (IATSE), Local 16, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Engaging in any of the conduct described immediately above in the remedy section of this decision;

(b) In any other like or related manner interfering with, restraining, or coercing employees in their exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

²³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Make McFarland whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all referral hall records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of the make-whole remedy due under the terms of this Order.

(c) Within 14 days after service by the Region, post at all its facility in San Francisco, California where notices to members and registrants are customarily posted, copies of the attached notice marked "Appendix."²⁴ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members and registrants are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members and registrants by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current members and registrants and former members and registrants who have used the hall at any time since March 28, 2018.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 20, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. May 30, 2019



Ariel L. Sotolongo
Administrative Law Judge

²⁴ If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" Shall Read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with your employer on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities
In recognition of these rights, we hereby notify you that:

WE WILL NOT suspend Damond McFarland's referral hall privileges or otherwise prevent him, or any other individual, from being referred for employment through our referral hall, because of unfair and/or arbitrary reasons;

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE HAVE rescinded McFarland's March 28, 2018 to June 21, 2018 suspension from our referral hall, and fully restored his ability to use our exclusive hiring hall referral services that he lost as a result of this suspension;

WE WILL make McFarland whole for any loss of earnings or benefits suffered as the result of our March 28, 2018 to June 21, 2018 unlawful suspension of his referral hall privileges;

WE WILL remove from our files and records any reference to the March 28, 2018 to June 21, 2018 suspension of McFarland's referral hall privileges and notify him, in writing, that this has been done and that the unlawful suspension of these privileges will not be used against him in any way.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE
EMPLOYEES, LOCAL 16
(Employer)

Dated _____ By _____
(Representative) (Title)

The Administrative Law Judge's decision can be found at www.nlr.gov/case/20-CB-218555 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov

901 Market Street, Suite 400, San Francisco, CA 94102-1735
(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (628) 221-8875